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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL LANE, MICHAEL O'LEARY, and RICHARD W. DeROBERTIS, et al.,

Petitioners,

vs.

WILLIE WILLIAMS, on behalf of himself and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

In addition to the questions presented in their Petition for Writ of Certiorari, Petitioners submit the following:

I. Whether the Special Master's Proposed Remedial Plan establishes a rational relationship between security and protective custody programs and services.

LIST OF PARTIES

The Petitioners were previously identified in their Petition for Writ of Certiorari.

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Petitioners, Michael Lane, Michael O'Leary and Richard DeRobertis, respectfully submit this reply in further support of their prayer that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on June 27, 1988.

OPINIONS BELOW

Petitioners rely on the statement of opinions below set forth in their Petition for Writ of Certiorari.

JURISDICTION

Petitioners rely on the statement of jurisdiction set forth in their Petition for Writ of Certiorari.

STATUTE INVOLVED

Petitioners rely on the statement of statute involved set forth in their Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioners rely on the statement of the case set forth in their Petition for Writ of Certiorari. In response to Respondents' counterstatement of the case in their Brief in Opposition, Petitioners note that the Proposed Remedial Plan which Respondents cite had not been submitted at the time of the filing of the Petition for Writ of Certiorari. Excerpts of the Special Master's Proposed Remedial Plan, filed with the United States District Court for the Northern District of Illinois, Eastern Division on December 20, 1988, are attached as Appendix A (App. A-1). Petitioners address the Proposed Remedial Plan, raised by Respondents' Brief in Opposition, in the Argument offered below.

REASONS FOR GRANTING THE WRIT

In addition to those arguments set forth in their Petition for Writ of Certiorari, Petitioners respond to the argument raised in the Brief in Opposition and supplement their prior arguments stating as follows:

ARGUMENT

I.

THE SPECIAL MASTER'S PROPOSED REMEDIAL PLAN ESTABLISHES A RATIONAL RELATIONSHIP BETWEEN SECURITY AND PROTECTIVE CUSTODY PROGRAMS AND SERVICES.

As Respondents point out in their Brief in Opposition, the District Court's opinion in this case and the Court of Appeals' affirmance of that opinion are predicated on the finding that there is no rational relationship between Petitioners' security concerns and the restrictions placed on the programs and services provided to protective custody inmates. Petitioners submit, however, that this finding is inconsistent with the Proposed Remedial Plan submitted by the Special Master[1] cited by the Respondents in their brief. *See*, App. A1-4. The plan actually documents the existence of the relationship between protective custody programming and security. In the introduction to the

[1] The Special Master, as noted in the Brief in Opposition, is Professor Norval Morris, former Dean of the University of Chicago Law School.

plan, the Special Master notes the relative safety of the protective custody unit at Stateville. Recognizing the "genuine difficulties" in operating a protective custody unit in an institution like Stateville, the Special Master further stated: "As the [Proposed Remedial] plan I offer is implemented, it must be appreciated that every increment of time in association and most increments of industrial, educational, and recreational programs increases the risk of injury to one prisoner inflicted by another". *See*, App. (A-4)

Thus, the Special Master's plan acknowledged the logical connection between Petitioners' security concerns and restricted programming which was ignored by the District Court. The plan was fashioned after the Special Master, his Monitor and experts on prison administration retained by the Special Master, made several extensive visits to Stateville.[2] During these visits, the Special Master, his Monitor, and his experts interviewed staff and inmates and were afforded unlimited access to and reviewed documents; all pursuant to the District Court's Order of Reference which afforded them unrestricted access to Stateville.

Furthermore, Petitioners submit that the Special Master's opinions in the plan mirror the convincing evidence found throughout the record that the heightened security concerns presented by protective custody inmates provided prison administrators a rational, logical basis for placing

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[2] The Monitor Mr. Morris selected was Mr. Michael Mahoney, Executive Director of the John Howard Association. The experts retained by the Special Master were Mr. Norman Carlson, former Director of the United States Bureau of Prisons and John Rees, Administrator of the Santa Fe County Detention Center, Santa Fe, New Mexico. Both experts have extensive corrections experience.

restrictions on programs and services offered to those inmates. For example, at trial Assistant Deputy Director DeRobertis, Warden O'Leary, Superintendent Wheaton and the Corrections Commissioner of Kentucky Al Parke, an expert witness, testified that restrictions on the out-of-cell movement of protective custody inmates and limitations on the numbers of protective custody inmates moved were the basic means used to protect protective custody inmates from general population inmates, as well as from other protective custody inmates. Vol. 7A, 29-30; Vol. 10B, 122, 125; Vol. 8B, 128-129; Vol. 10A, 49. Moving large groups of protective custody inmates to program areas increases the risk of attack because contact with general population inmates from whom these inmates are seeking protection is increased and supervision of mass line movements is more difficult. Vol. 7A, 36; Vol. 10B, 125. Supervision is made even more difficult due to blind spots on the route to program areas, including the library, educational building, vocational school and gymnasium (Vol. 8B, 148-150) and due to the complex scheduling of activities for all inmates throughout the 64-acre institution. Vol. 7A, 48, 50-51.

The Special Master's Proposed Remedial Plan also recognizes what experience has taught Petitioners: first, that the current operation of protective custody is relatively safe, thereby meeting the inmates' security concerns; and second, that increasing programs and services for inmates in protective custody will necessarily downgrade that security. At trial, Petitioners established that different methods of providing programs to protective custody were attempted over time but proved unsuccessful. When the Petitioners tried to move a relatively large number (50-60) of protective custody inmates at one time, to go to the yard, numerous assaults occurred. Vol. 8B, 128-129. Com-

plaints were received from protective custody inmates that they were being intimidated by general population inmates when they were permitted to go to the kitchen to obtain food. Vol. 8B, 147. When routine protective custody showering schedules were not followed because of protective custody work assignments, a protective custody inmate was murdered in 1984 by two other protective custody inmates. Vol. 8B, 127-138. When protective custody inmates were permitted to eat on the flag instead of in their cells, a sanitation problem was created. Vol. 10B, 134.

The District Court, in ordering increased communal activities including dining, recreation, education, religious services and library access, ignored basic security concerns which were established at trial and acknowledged by the District Court's own Special Master. The District Court's opinion cannot be reconciled with the opinion of its own Special Master. Because the Special Master's Proposed Remedial Plan establishes that there is a rational basis between security and restrictions on protective custody inmates' access to programs and services, the decision of the Court of Appeals should be reversed.

Respondents argue that this case is controlled by the opinion in *Anderson v. City of Bessemer City N.C.*, 470 U.S. 564, 105 S.Ct. 1504 (1985) and that a district court's findings of fact may not be overturned unless "clearly erroneous". This "clearly erroneous" standard was defined by this court in *Anderson*.

> Although the meaning of the phrase 'clearly erroneous' is not immediately apparent certain general principles governing the exercise of the appellate court's power to overturn findings of the District Court may be derived from our cases. The foremost of these principles . . . is that *'[a] finding is clearly*

> *erroneous, when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.* [Citation Omitted] [Emphasis Added] 470 U.S. at 573

Petitioners submit that an examination of *all* the facts in the record show that there is a logical relationship between safety and security of the protective custody inmates at Stateville and the existing restrictions on programming at Stateville. As this Court has noted in *Vance v. Bradley*, 440 U.S. 93, 110-112, 99 S.Ct. 939, 949-50 (1979), in order for there to be a finding of no rational relationship consistent with constitutional requirements, there must be a finding of no logical connection between the means chosen and the ends sought to be achieved. The admission that a relationship between means and ends exists should immunize the policy in question from constitutional challenge. 440 U.S. at 112, 99 S.Ct. at 950. The Special Master's plan clearly establishes the existence of such a relationship. *See*, App. A-4.

Furthermore, while Respondents' Brief in Opposition suggests that the opinion below blazes no new trails, a decision which places in the hands of a district court, and not prison officials, the delicate balance between inmates' security (in a protective custody unit designed to ensure their safety) and inmate programming is, in fact, new law. The Court of Appeals' opinion mandates "constitutional relief" that has never been required by any decision of this Court or any other court and, therefore, merits further review by this Court.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIE WILLIAMS, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

MICHAEL LANE, et al.,

Defendants.

No. 81 C 0355—Judge Milton I. Shadur, Presiding

PROPOSED REMEDIAL PLAN

December 20, 1988
submitted by
Norval Morris, Special Master

INTRODUCTION

This proposed remedial plan provides for a dramatically different protection custody regime than that now enforced at Stateville. Lest it be thought the product of an academic's specious imaginings, let me stress that in its broad contours, its shape and most of its details, it closely tracks recommendations made by representatives of the Department of Corrections at a week-end meeting (a "retreat") convened for this purpose in mid-November. At that meeting, Mr. Mahoney and I, assisted by Mr. Norman Carlson, and Mr. John Rees, were the recipients of the Department's suggestions, and found ourselves not only in agreement with their broad thrust and most of their details,

but also impressed by the care and generosity of spirit with which they had been prepared. There were, of course, sticking points and points of conflict, but they concerned matters of detail and scope, not issues of the general direction to be followed.

I have not isolated what were and what were not Departmental recommendations. The meeting at which the pattern of this proposal was settled was intended to be one of free exchange, advisory rather than in any way binding; but it is nevertheless proper for me to stress that the theme of this remedial plan is essentially a product of the work of members of the Department of Corrections—to whom I am grateful.

Many of the problems of this protracted litigation have their origin, [sic] (in my view, and in that of the consultants who have assisted me, and members of the staff of the Department of Corrections in their unguarded moments, in what I have come to think of as the hydraulic effect of protective custody.

It is a problem common to many large prisons in this country. If the large maximum-security prisons prove to be largely ungovernable, heavily influenced by gang behavior, places of pervading fear for the weak and the isolate, protective custody gains in attraction to many prisoners. This is particularly true when protective custody provides both relative safety and single celling. Further, it is extremely difficult to test the reality of fears for their safety expressed by prisoners as a reason for seeking protective custody (many prisoners gave to me, as their reasons for being in protective custody, reasons which were inconsistent with the defined purposes of that classification and different from what they had earlier claimed in order to gain admission to protective custody).

There thus emerges a serious problem of "gate keeping" if the prison authorities are not to be faced with the task of running two prisons in every large maximum-security prison. And there thus further emerges a strong temptation to make the conditions in protective custody substan-

tially less congenial, setting aside personal harassment and safety, than those allowed by general population of the prison. This temptation is abetted by the understandable desire, enforced by threat of civil suit, to make conditions in protective custody extremely safe—which is another way of saying lacking in the usual prison programs, since each increment of program adds an increment of risk of injury.

Recognizing these genuine difficulties, I had at first been encouraged by the authorities at Stateville, by counsel to the Department of Corrections and counsel to the plaintiffs, to include in the commentary to this proposed remedial plan some ideas that might help to mitigate this problem. At the "retreat" I was advised that, for reasons relating to other cases confronting the Department, they did not wish me to deal at any length with this problem—merely to note its obvious existence, as I now have. Since the terms of reference of my appointment do not include this issue, I shall take the matter no further unless requested to do so by the Court.

A further important issue was also withdrawn from discussion by the Department at the "retreat." I will merely mention what it was and avoid exegesis. Norman Carlson, John Rees, Michael Mahoney and I are all of the view that double celling in protective custody, at least to the same proportional extent that it exists in the general population, though undesirable, is not inappropriate given population pressures, and that it can be done without serious threat to security. The Department's position is that double celling does not fall within my terms of reference and they requested that I should not expand on the topic, though prior to the "retreat" I was being encouraged to deal with it.

As a final introductory comment let me add this: A prison in complete lock-down, while it is in lock-down, is a safe prison. Protective custody now at Stateville—which is not in lock-down but is very tightly controlled, with limited inmate interaction, and with rarely any substantial number of prisoners out of their cells at any one

time—is a relatively safe form of imprisonment, as indicated by the low indeces of assaults there as compared to the general population. As the plan I offer is implemented, it must be appreciated that every increment of time in association and most increments of industrial, educational, and recreational programs increases the risk of injury to one prisoner inflicted by another. Hence, failures of equal protection in one protective custody regime, as at present, risk being supplanted by failures sufficiently to protect the inmates one from another. The balance is neither obvious nor easy to strike. It is my view that the balance struck in the following proposed remedial plan avoids any failure of equal protection and yet provides for the establishment of constitutionally safe protective custody regimes at Stateville.

The proposal is arranged under the following headings:

Full and Limited Programs
Religion
Library (Law and General)
Education
Jobs and Pay
Food
Recreation
Cell Time and Association
Monitoring

Under each heading there is a proposal and a commentary. Where appropriate a cost estimate is included at the end of each commentary. The proposals are collected into a Proposed Remedial Order appended to this document.

Mr. Mahoney has authorised [sic] me to state that he is in express and detailed agreement with me in the proposed remedial plan and that he also agrees with the general tenor of the commentary.

Many have helped Mr. Mahoney and me in this task, but we both wish to express our particular gratitude to Mr. Leo Meyer, Warden O'Leary, Mr. Norman Carlson, Mr. John Rees, and Ms. Judy Cottle.

* * * * *